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Supreme Court of the United States

October Term, 1957

No. 97

WILLIE BENNETT,

Petitioner,

against

S.S. MORMACTEAL, her engines, etc., and MOORE-McCORMACK LINES, INC.,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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I. Is *In Rem* Liability a Legal Fiction Which Should Now be Abandoned?

Respondent argues that the admiralty principle of the personification of a vessel is a legal fiction which has outlived its usefulness, and should now be eliminated. To support this view, it cites *Consumers Import Co., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249, 64 Sup. Ct. 15 (1943); *The City of Norwich*, 118 U. S. 458, 6 Sup. Ct. 1150 (1886); *The Eugene F. Moran*, 212 U. S. 466, 29 Sup. Ct. 339 (1909); *The Western Maid*, 257 U. S. 419, 42 Sup. Ct. 159 (1922); and an excerpt from Gilmore and Black on the Law of Admiralty (1957) at page 510.

Respondent states that the *Consumers Import Co.* case is the "most recent case" in which this Court dealt with this subject matter. A decision of this Court, more recent than all of the cases relied upon by respondent, is *Canadian Aviator, Ltd.* v. *U. S.*, 324 U. S. 215, 224, 65 Sup. Ct. 639, 644 (1945), in which Mr. Justice Reed stated at page 224:

> "Such personification of the vessel, treating it as a juristic person whose acts and omissions, although

> brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court. (Citing cases.)''

Respondent also places great reliance upon the opinion of Judge Learned Hand in the *Consumers Import Co.* case, while that case was still in the Court of Appeals. That was not a personal injury suit involving an injured longshoreman attempting to recover damages for his hurt based on *in rem* liability. On the other hand, *Grillea* v. *U. S.*, 232 F. (2d) 919 (C. A. 2d, 1956), was a recent opinion by Judge Learned Hand in just such a longshoreman's personal injury case. *Grillea* was based on *in rem* principles and unseaworthiness, on the government's consent to be sued under the Suits in Admiralty Act (46 U. S. C. A. 743).[1]

Whatever may have been Judge Learned Hand's thoughts as expressed in the *Consumers Import Co.* opinion, it is clear that he stated in *Grillea,* at pages 923, 924, much

[1] Respondent indicates that in *Grillea* the attorneys representing the vessel did not raise or rely upon the Longshoremen's Compensation Act as constituting a defense. We also note the mistaken statement in Judge Abruzzo's opinion (the district judge who rendered the decision in the instant case) that in *Grillea,* respondent did not call the Court's attention to the *Smith* and *Samuels* cases. We have carefully examined the papers and briefs which were submitted to the Court of Appeals in the *Grillea* case, and there is no doubt that the *Smith* and *Samuels* cases were called to the attention of the Court of Appeals, and that the very point relied on by the respondent here, was made in that case. The *Grillea* opinion was rendered following a petition for rehearing, made on behalf of the injured longshoreman. The government was represented by the same attorneys who represent Moore McCormack Lines Inc. here. The government cited both the *Smith* and *Samuels* cases under Point III of its answer to said petition for rehearing, in which it expressly made the argument that the exclusive remedy provisions of the Longshoremen's Compensation Act immunized not only the shipowner and operator, but also the vessel *in rem.* This argument was rejected by Judge Learned Hand in his opinion referred to above.

more recently, i.e. in 1956, that the question raised by the respondent posed

> "the question whether a maritime lien can be imposed upon a ship for a claim on which no jural person is liable, 'in personam'. Moreover, although in the case at bar the demisee (steamship company) was liable under the Longshoremen's and Harbor Workers Act, 33 U. S. Code, Section 301, the liability was only for compensation—a claim different from that in suit, both in kind and amount. So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'." (parenthetical matter supplied)

Actually, in the *Consumers Import Co.* case, this Court did hold that the limitation of liability provisions contained in the Fire Statute would apply not only to the owner, but also to the vessel itself. But the Supreme Court expressly pointed out there that the shipper of cargo protects himself against fire losses in commercial practice, as a practical matter, and if the ship were to continue to be fully liable *in rem*, it "would restore the insurance burden at least in large part, to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England". The statute was therefore interpreted so as to carry out the intent of Congress, *i.e.* that cargo insurance should bear the loss, if the applicable facts brought the case under the statute.

It is interesting to compare this language with that contained in the *Sieracki* case, in which Mr. Justice Rutledge stated at page 94, "And beyond this, he (the shipowner) is in a position, as his worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost" (parenthetical matter supplied). The intent of Congress here, in personal injury cases of maritime workers, was that the shipping community, and its insurance, was to bear the loss or cost of indemnity.

City of Norwich, supra, and *The Eugene F. Moran, supra*, also were not personal injury cases. In the latter case, the Court ruled that an innocent car float owned by a railroad could not be sued *in rem*, where it was merely an appendage of a wrongdoing tug owned by another company. In refusing to extend the doctrine of independent personality to a vessel not guilty of any fault or wrongdoing, Mr. Justice Holmes made the following remarks:

> "* * * No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible, on principles of agency or otherwise, is carried further here than in England. The China, 7 Wall. 53, 19 L. ed. 67; The Barnstable, 181 U. S. 464, 467, 468, 45 L. ed. 954, 957, 21 Sup. Ct. Rep. 684; Homer Ramsdell Transp. Co. v. La Campagnie Generale Transatlantique, 182 U. S. 406, 413, 414, 45 L. ed. 1155, 1160, 21 Sup. Ct. Rep. 831. See The Blackheath (United States v. Evans), 195 U. S. 361, 366, 49 L. ed. 236, 237, 25 Sup. Ct. Rep. 46."

In *The Western Maid, supra*, the question involved was whether a public vessel owned by the government, could be liable *in rem*, where the government had not waived sovereign immunity. In answering this in the negative, Mr. Justice Holmes held that the doctrine of sovereign immunity applies not only to governments, but also to government vessels, in the absence of waiver, stating, however, at page 433:

> "It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force. See Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U. S. 48, 53, 40 Sup. Ct. 66, 64 L. Ed. 130."

In other words, the cases on which respondents rely, recognize the principle for which petitioner here contends.

In *The John G. Stevens*, 170 U. S. 113, 18 Sup. Ct. 544 (1898), the Court quoted with approval from the language in *The China*, 7 Wall. 53, 68, as follows:

> "The maritime law as to the position and powers of the master and the responsibility of the vessel is not derived from the civil law of master and servant nor from the common law. It had its source in the commercial usages and jurisprudence of the Middle Ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor."

There is another recent case in which Judge Learned Hand expressly recognized the important distinction between *in rem* and *in personam* liability in admiralty, i.e. *Burns Bros* v. *The Central R.R. of N. J.*, 202 F. (2d) 910 (C. A. 2d, 1953), where that Court stated, at page 912:

> "As is well known, it has from the beginning been true that in suits *in rem* the vessel has been regarded as tort feasor. * * * it is hard to explain the present law as to liens for collision on any other theory than as a vestigial devolution out of the notion that anything that moves and kills a man shall be deodand to the king."

Thus, in *U. S.* v. *The Little Charles*, 26 Fed. Cas., page 979, No. 15,612, Circuit Judge Marshall stated:

> "This is not a proceeding against the owner; it is a proceeding against the vessel for any offense committed by the vessel which is not less an offense * * * because it was committed without the authority and against the will of the owner."

The above quotation by Judge Marshall was quoted with approval by Judge Learned Hand in the *Burns Bros.* case.

In *1 Benedict on Admiralty*, 6th Ed. (Knauth), the principle is stated as follows at page 20:

> "The foundation of jurisdiction *in rem* is the taking of the vessel into the custody of the Court and the characteristic virtue of a proceeding *in rem* is that it operates directly upon the res as the titular re-

> spondent in the suit and the actual subject matter of the jurisdiction and not, as at common law, mediately through the right, title or interest of a party brought before the Court as defendant through personal service or the mere attachment of property as his with a view to subjecting his interest therein to the satisfaction of the judgment."

Robinson on Admiralty (1939) states at page 612:

> "For it must be remembered that if the owner resists liability in personam the ship is still liable in rem.
>
> * * *
>
> The innocence of any wrongdoing or negligence on the part of the owner does not safeguard her from this result of the 'personification' of a ship."

Mr. Justice Holmes, in *Liverpool, etc. Navigation Co.* v. *Brooklyn, etc. Terminal*, 251 U. S. 48, 53, 40 Sup. Ct. 66, 67, stated:

> "The notion as applicable to a collision case seems to us to be that if you surrender the offending vessel you are free, just as it was said by a judge in the time of Edward III, 'if my dog kills your sheep and I freshly after the fact tender you the dog, you are without recourse against me'. Fitz. Abr. Barre, 290."

In the *Severance*, 152 F. (2d) 916 (C. A. 4th, 1945), cert. den. 328 U. S. 853, 66 Sup. Ct. 1344 (1946), Circuit Judge Dobie stated at page 922:

> "It is of course trite to say that the inanimate vessel could have had no responsibility for the accident, but it is the distinguishing and characteristic feature of admiralty jurisprudence that a suit *in rem* may be brought against a vessel which is involved in an accident where loss of life or property is caused by the negligence of the owner or the men in charge."

It is, therefore, clear that when the Court in *Smith* v. *Mormacdale* referred to the *in rem* liability of a vessel as a

mere "legal fiction", and stated that the vessel could not be separated from its owner, it was postulating its conclusion on a completely erroneous premise; and it was merely following the Third Circuit decision in the *Samuels* case, which had been decided without any citation of authority to justify its conclusion.

II. This Honorable Court has Never Passed on the Precise Important Issues Involved Herein

Respondent relies on *Swanson* v. *Marra Bros., Inc.*, 328 U. S. 1, 66 Sup. Ct. 869 (1946). However, the *Swanson* case was a Jones Act suit by an injured longshoreman against the independent stevedoring contractor, which had employed him. He sought to recover damages for an accident which he had sustained while working on a dock alongside the vessel. The Court held that the Longshoremen's Compensation Act barred an employee of an independent stevedoring company from suing his own employer for such damages sustained on the dock. It is interesting to note that Mr. Justice Stone, however, pointed out that, in the Court's view (referring to Jones Act principles of recovery),

> "Congress intended to extend them to stevedores, the employees of an independent contractor while working on a vessel in navigable waters and while rendering service customarily performed by seamen."

As we have seen, the *Swanson* case involved an accident occurring on land, while the *Sieracki* case, which was decided by the Supreme Court on the same day, involved an injury sustained aboard a ship. In the latter case, the Supreme Court also took pains at pages 89-90, to point out that the injured longshoreman was employed by an independent stevedoring contractor and that "there could be no question of petitioner's (the steamship company's) liability for respondent's injury incurred as they were here, if he had

been in petitioner's employ rather than hired by a stevedoring company". In other words, in *Sieracki*, the Court ruled that it was giving the injured man the same rights he would have had, were he employed directly by the steamship company. At page 101 of that decision, the Court also expressly pointed out that "the Compensation Act did not have the effect of withdrawing from longshoremen all of the other obligations relating to personal injuries, which otherwise might be available to them under the General Maritime Law". In the face of this language, how can it be fairly said that a longshoreman employed by a steamship company shall have less right to a remedy for failure to supply a seaworthy vessel, than one employed by an independent contractor?

Respondent also calls attention to Section 953 of Title 46 of the U. S. Code (The Ship Mortgage Act). This favors petitioner's position. It indicates that Congress recognizes that in the rare instances in which a stevedore is employed directly by a shipowner, he is entitled to the same preferred maritime lien for wages as is given to a seaman.

Respondent also refers to a statement made by a longshore union official at a Judiciary Committee hearing, to indicate that Congress was aware of the distinction between longshoremen employed directly by shipowners, and longshoremen employed by independent stevedoring contractors. Having previously argued that no distinction was recognized in the Compensation Act, respondents then take an apparently opposing view. The logic of the argument seems elusive. In any event, it is difficult to see how isolated instances can assist the Court in construing what Congress intended, insofar as the issue here is concerned, at the time it actually passed the Compensation Act in both Houses. Is it reasonable to suppose that the members of both Houses expressly had in mind, at that time, "the instances, presumably rare, where he (the longshoreman) may be hired by the owner"? *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 102, 66 Sup. Ct. 872 (1946).

Conclusion

This case presents important questions involving basic rights of longshoremen. The decision of the Court below brings about a discriminatory rule not only as between different groups of longshoremen, but also as between different groups of ship operators. Furthermore, it strikes at the very foundations of an important and distinctive admiralty principle, i.e. the independent liability of a vessel *in rem*, as a juristic personality, responsible for its own torts.

It is respectfully submitted that these important questions should be reviewed by this Honorable Court.

Respectfully submitted,

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